No. 76-841

In the
Supreme Court of the United States

OCTOBER TERM, 1976

STATE OF ILLINOIS;
Clark County, Illinois;
Crawford County, Illinois;
Lawrence County, Illinois;
Wabash County, Illinois;
City of Robinson, Illinois;
City of Mount Carmel, Illinois;
Greater Wabash Regional
Planning Commission,
Petitioners,

v.

CONSOLIDATED RAIL CORPORATION,
Respondent.

Supreme Court, U. S.
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PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT REGIONAL RAIL REORGANIZATION ACT OF 1973

160 North LaSalle Street
Chicago, Illinois 60601
(312) 793-2501

4 West Seminary Street
Danville, Illinois 61832
(217) 443-0304

One IBM Plaza — Suite 3200
Chicago, Illinois 60611
(312) 467-6540

2300 South Dirksen Parkway
Springfield, Illinois 62764
(217) 782-3215

WILLIAM J. SCOTT
Attorney General
State of Illinois

JOHN P. MEYER
Special Assistant Attorney General

LEE A. FREEMAN, JR.
Special Assistant Attorney General

KEVIN B. McCARTHY
Assistant Chief Counsel
Illinois Department of Transportation
Counsel for Petitioners

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Petitioners (hereafter the "State of Illinois") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Special Court, Regional Rail Reorganization Act of 1973, entered in this proceeding on November 29, 1976.

OPINIONS BELOW

The opinion of the Special Court, not yet reported, appears in Appendix B hereto. The Findings of Fact and

Conclusions of Law of the United States District Court for the Eastern District of Illinois made for the issuance of a temporary restraining order in the related matter of *State of Illinois* v. *Consolidated Rail Corporation,* No. 76-2-042 (E.D. Ill.), appear in Appendix C hereto, and the Permanent Injunction issued by the District Court appears in Appendix D hereto.

JURISDICTION

The jurisdiction of the Supreme Court to review the decision of the Special Court is conferred by Section 209(e)(3) of the Regional Rail Reorganization Act of 1973 (hereafter cited as the "1973 Rail Act"), as amended by Section 602(b) of the Railroad Revitalization and Regulatory Reform Act of 1976 (hereafter cited as the "1976 Rail Act"), which provides as follows:

> "A final order or judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of this chapter, in whole or in part, or of any action taken under this Act, shall be reviewable by direct appeal to the Supreme Court of the United States in the same manner that an injunctive order may be appealed under section 1253 of Title 28, United States Code. Such review is exclusive and any petition or appeal shall be filed not more than 20 days after entry of such order or judgment."

The Special Court's decision was based upon its claim of jurisdiction under Section 209(e)(1)(C) of the 1973 Rail Act, as amended by Section 602(b) of the 1976 Rail Act, and is a final order of that Court. *Construction*

Laborers' Local No. 438 v. *Curry,* 371 U.S. 542, 550-551 (1963); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 418 n.* (1971); *American Radio Ass'n* v. *Mobile Steamship Ass'n,* 419 U.S. 215, 217 n.1 (1974).

QUESTIONS PRESENTED

1. Did the Special Court violate the limits of its jurisdiction under Section 209(e)(1)(C) of the 1973 Rail Act, as amended by Section 602(b) of the 1976 Rail Act, and thereby unjustifiably contravene a decision of the United States District Court, disrupt proceedings before the Court of Appeals for the Seventh Circuit, and encroach upon the authority of the Interstate Commerce Commission?

2. Was the holding of the District Court that it had jurisdiction of the matter and that ConRail could not use the L & N trackage without prior ICC approval *res judicata* in the Special Court and subject to review only in the Court of Appeals?

3. Did the Special Court err in issuing a preliminary injunction on the basis of conclusions reached without evidence, which directly conflicted with the findings of the District Court, based upon a full evidentiary record, that irreparable damage would result to the State of Illinois and the other petitioners if the status quo were disturbed?

STATUTORY PROVISIONS INVOLVED

Because of their length, the statutory provisions involved in this matter have been printed in Appendix A hereto.

STATEMENT OF THE CASE

This case raises important questions relating to the jurisdictional limits of the Special Court under the 1973 Rail Act, as amended by the 1976 Rail Act (App. 1a-7a). Basically, these Acts provide for a federally financed reorganization of the Penn Central Railroad and six other bankrupt railroads. The Rail Acts apply to operations in the seventeen states in the Northeastern and Midwestern sections of the nation.[1]

The United States Railway Association (USRA) was created by the 1973 Rail Act to develop a Final System Plan (FSP), which became effective on November 9, 1975. The FSP designated the properties of the bankrupt carriers which would be transferred to ConRail, a private not-for-profit corporation established under authority of the 1973 Rail Act and incorporated under Pennsylvania law, or to other solvent carriers. The FSP also designated the rail properties of profitable railroads which could be acquired by ConRail.

Under the FSP, if ConRail were to acquire rail properties or rights to operate over the tracks of a solvent line, it was required by Section 206(d)(4) of the 1973 Rail Act, as amended, to enter into a final agreement with that line within a 95-day period after the effective date of the FSP. ConRail and the solvent railroad also were required by Section 508(b) of the 1973 Rail Act, as amended, to obtain labor protective agreements with the representatives of the railroad's employees as a precondition to their authority to enter into the trackage

[1] This Court reviewed the constitutionality of portions of the 1973 Rail Act in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 108-117 (1974), and summarized its structure and objectives.

agreement. If the trackage agreement was finally executed within the statutorily prescribed time limits and met the labor protection conditions, the transfer of property or operating rights of a profitable railroad took place without any action of the Interstate Commerce Commission (ICC). But if those limits or conditions were not met, the agreement to transfer property or trackage rights became subject to prior ICC approval under 49 U.S.C. §1, par. (18) and §5, par. (2).

Prior to April 1, 1976, ConRail operated freight trains on Penn Central track wholly within Illinois between Cairo and Danville. Many of these shipments were of coal from southern Illinois through to Chicago. The FSP, however, excluded a portion of this route and provided that ConRail could secure and use trackage rights through Indiana from the Louisville and Nashville Railroad Company (L & N), a solvent carrier, in lieu of the excluded portion of the Penn Central track.[2] The FSP also stated that the excluded portion would be designated to ConRail, however, if the L & N trackage rights were not secured. On April 1, 1976, ConRail began diverting freight shipments from the Penn Central line in Illinois to the L & N trackage through Indiana.

The State of Illinois, therefore, filed an action against ConRail in the United States District Court for the Eastern District of Illinois. The District Court held that it had jurisdiction over the matter[3] and that the case

[2] The L & N trackage was only one of several alternative routes which the FSP designated for possible acquisition by ConRail. Final System Plan, Vol. I, at pp. 333-334.

[3] It based its jurisdiction on 28 U.S.C. §§1331, 1332, 1337, 1391 and 1651, and also on 49 U.S.C. §1, par. (18) and §5, par. (2).

did not fall within the grant of exclusive jurisdiction to the Special Court.

The basic dispute in this litigation was whether ConRail secured the trackage rights from the L & N within the time limits and labor protective provisions of the 1973 Rail Act and the 1976 Rail Act. Those Acts provided that the designation of the solvent railroad properties or trackage rights to ConRail would terminate 95 days from November 9, 1975—the effective date of the FSP—unless prior to that date the necessary agreements were concluded. The District Court concluded, after taking evidence, that the ConRail-L & N trackage agreement was not executed before the statutory deadline of midnight, February 11, 1976. The District Court further held that the necessary labor protective agreements had not been concluded before the statutory deadline and that the agreement was not binding since ConRail had the option whether to effectuate it until January 1, 1977. (App. 42a-43a).[4]

The District Court also found that the State of Illinois would be irreparably injured without injunctive relief from the ConRail diversion, whereas ConRail would not suffer irreparable harm from such relief. The State of Illinois had entered into an operating agreement with ConRail on March 29, 1976, which provided for rail operations by ConRail over the portion of the Penn Central line excluded from the FSP. Illinois was to subsidize ConRail for the amount by which the costs of those operations exceeded the revenues obtained, but Illinois would receive

[4] The District Court also noted that ConRail and L & N were "not even operating pursuant to the purported agreements but in fact have varied the agreements subsequent to their execution." The District Court found that ConRail's operations were violating the routing restrictions specified in the agreements. (App. 43a).

all profits gained from the operations. In addition, the State of Illinois formulated a State Rail Plan as authorized by Title IV of the 1973 Rail Act. Under that Plan, which was approved by the Federal Railroad Administration and the Illinois General Assembly, the State undertook to rehabilitate the track of the excluded portion. Any profits gained from the ConRail operations over the track could be used for rehabilitation. The diversion of traffic by ConRail would thus increase Illinois' subsidies to ConRail, eliminate any chance of profits accruing to Illinois, and reduce the funds available for rehabilitation.[5] The District Court therefore enjoined ConRail from diverting freight over the L & N trackage without the prior ICC approval required by statute. (App. 49a).

ConRail filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit, but did not seek a stay of the District Court's injunction.

ConRail and L & N then published a joint tariff permitting ConRail coal trains to operate over the L & N trackage. The State of Illinois notified the ICC of its opposition. Although the ICC did not suspend the tariff, it did begin an investigation of the matter. The tariff became effective on August 31, 1976, but will expire on December 31, 1976.

On September 1, 1976, the State of Illinois served ConRail with notice of an arbitration proceeding under the provisions of the ConRail-Illinois agreement on the

[5] The District Court found that the other petitioners—counties and cities through which the excluded portion passes—would also suffer from the diversion by losing tax revenues resulting from the operations and from the general decline of business activity along the line. (App. 46a).

question whether the diversion of traffic violated that agreement.

Instead of pursuing its appeal in the Seventh Circuit, ConRail filed a complaint in the Special Court. It sought a declaratory judgment that the ConRail-L & N trackage agreement had been executed within the time limits of the 1973 Rail Act, as amended, and an injunction preventing petitioners from seeking to enforce the District Court injunction and from litigating the disputed matters in any other forum, including arbitration.

The Special Court granted the relief sought. It asserted exclusive jurisdiction over the questions presented on the grounds that the failure of ConRail to secure in a timely manner the trackage rights designated in the FSP from L & N would trigger a ministerial duty on the part of the USRA to designate the excluded portion of the Penn Central line to ConRail. (App. 19a). The Special Court refused to give the District Court decision *res judicata* effect and held that, under its interpretation of the statutory time limits for the trackage agreement, the ConRail-L & N agreement had been timely.[6] It issued the preliminary injunction sought by ConRail on the grounds that ConRail appeared likely to succeed on the merits, that the State of Illinois had suffered only the financial harm that was contemplated by the FSP originally, and that denial of injunctive relief would "frustrate" ConRail's efforts to improve the efficiency of railroad operations.

[6] The determination by the Special Court constitutes a final resolution of the issues that were presented by ConRail's complaint.

REASONS FOR GRANTING THE WRIT

I. The Special Court Exceeded the Carefully Defined Limits of Its Jurisdiction.

In enacting the 1973 and 1976 Rail Acts, Congress explicitly confined jurisdiction of the Special Court to certain "central functions" and recognized the authority of the federal courts to resolve issues involving the effect of the Rail Acts upon other laws that govern railroad operations. Previous drafts of legislation had given broad exclusive jurisdiction to the Special Court. Under the bills originally proposed in the Senate and House, the Special Court would have had exclusive jurisdiction over the matters raised in this litigation.[7] But these bills were not enacted into law. Instead, Congress limited the Special Court's exclusive jurisdiction to six categories of civil

[7] The Senate bill drafted in 1975 defined exclusive Special Court jurisdiction as follows:

> "(e) Civil Actions—(1) Notwithstanding any other provision of law, any action—
>
> (A) for injunctive or other relief from the enforcement, operation, or execution of [the] Act or any provision thereof, or from any action taken pursuant to authority purportedly conferred under this Act;
>
> (B) challenging . . . the illegality of any action or any failure to take action pursuant to authority conferred or purportedly conferred under this Act;
>
> (C) to enforce or declare any rights under this Act;
>
> • • •
>
> shall be within the original and exclusive jurisdiction of the special court." S.2718, 94th Cong., 1st Sess., §602(b).

See also S.Rep.No. 499, 94th Cong., 1st Sess. 83 (1976). The House bill similarly conferred broad jurisdiction on the Special Court. H.R. 10979, 94th Cong., 1st Sess., §910(h).

actions. *See* Section 209(e)(1) of the 1973 Rail Act, as amended by Section 602(b) of the Rail Act[8] The Conference Report unambiguously states the Congressional purpose to restrict Special Court jurisdiction to certain "central functions" under the Acts:

> "The conference substitute eliminates the provision giving the special court exclusive jurisdiction over any action to enforce or declare rights under the Rail Act of 1973. Many actions covered by this provision undoubtedly would be within the exclusive jurisdiction of the special court under other provisions of this bill, but still others may be of no concern to the central functions of the special court under the Rail Act of 1973, as amended." S. Rep. No. 94-595, 94th Cong., 2d Sess. 188 (1976).

[8] Notwithstanding any other provision of law, any civil action—

(A) for injunctive or other relief against the Association from the enforcement, operation, or execution of this chapter or any provision thereof, or from any action taken by the Association pursuant to authority conferred or purportedly conferred under this chapter;

(B) challenging the constitutionality of this chapter or any provision thereof;

(C) challenging the legality of any action of the Association, or any failure of the Association to take any action, pursuant to authority conferred or purportedly conferred under this chapter;

(D) to obtain, inspect, copy, or review any document in the possession or control of the Association that would be discoverable in litigation pursuant to section 743(c) of this title;

(E) brought after a conveyance, pursuant to section 743(b) of this title, to set aside or annul such conveyance or to secure in any way the reconveyance of any rail properties so conveyed; or

(F) with respect to continuing reorganization and supplemental transactions, in accordance with section 745 of this title;

shall be within the original and exclusive jurisdiction of the special court."

The Special Court concluded that this action fell under Section 209(e)(1)(C) of the 1973 Rail Act as one "challenging the legality of any action of the Association [USRA], or any failure of the Association to take any action, pursuant to authority conferred or purportedly conferred under this chapter . . . ."

The Special Court acknowledged that the State of Illinois had not expressly or directlly challenged the USRA in any manner:

> "USRA did not, in terms, require ConRail and L & N to conclude an agreement, nor was the original designation by USRA of L & N trackage challenged. In addition, the Illinois-ConRail Operating Agreement was not negotiated by USRA, nor does the interpretation of the agreement directly involve USRA." (App. 19a).

Nonetheless, the Special Court asserted jurisdiction on the ground that the State of Illinois had implicitly challenged the failure of the USRA to certify the excluded portion of the Penn Central line for conveyance to ConRail in the event that ConRail and L & N had failed to execute a timely trackage agreement.[9]

The Special Court's jurisdictional holding rests on a complete mischaracterization of the position taken by the State of Illinois and a misinterpretation of the relevant provisions of the 1973 Rail Act, as amended. The State

[9] With a similar lack of justification, the Special Court found an implicit challenge to the failure of USRA to designate the excluded portion for conveyance to ConRail under Section 208(d) of the 1973 Rail Act, as amended, which provides for designations supplemental to the FSP. (App. 19a-20a).

of Illinois contended that the untimeliness of the ConRail-L & N trackage agreement removed its exemption from ICC review. If that contention prevailed, the next step would *not* be USRA conveyance of the excluded portion of the Penn Central line to ConRail, but submission of the ConRail-L & N proposal to the ICC for its approval, under 49 U.S.C. §1, par. (18) and §5, par. (2).

By submitting its proposal to the ICC, ConRail could still obtain the L & N trackage rights, and as a result, the USRA would not have to convey the excluded portion to ConRail under the FSP.[10] The State of Illinois plans to challenge the proposal before the ICC on the grounds that the public interest and convenience would be best served by ConRail operation over the Penn Central line. If that challenge were successful, ConRail would not be permitted to use the L & N trackage and would continue to use the excluded portion of the Penn Central line. ConRail would then have various alternatives. It could continue such operations under its subsidy agreement with the State of Illinois. It could purchase the excluded portion from the Penn Central trustees. It also could seek a supplemental designation of the excluded portion by the USRA under Section 208(d) of the 1973 Rail Act, as amended.[11] Under

[10] In fact, ConRail recognized this possibility by filing a joint tariff before the ICC, and the ICC is now investigating the matter. *See* ICC Docket No. 36420, Joint-Line Routing on Coal, CR and LN RR's.

[11] The statement in the FSP, quoted by the Special Court, that the excluded portion would be conveyed to ConRail if the L & N trackage rights were not obtained, has no basis in the Rail Acts or other legal authority. It was not a designation. The Special Court in a prior decision itself recognized that USRA statements in the FSP which were not designations had no binding effect. *Schuler* v. *Patton,* 416 F. Supp. 1252, 1255-1256 (1976).

none of these alternatives would action by the USRA or its failure to act be subject to legal challenge by the State of Illinois, nor would there be any other basis for a future challenge of the USRA if the District Court decision were upheld.

The USRA itself recognized the basis for the District Court's jurisdiction. In its Statement of Position filed in the District Court in conjunction with its motion for leave to appear as *amicus curiae,* the USRA stated its view that if the District Court found the ConRail-L & N agreement to be timely, the District Court had no jurisdiction to proceed any further with the case. It expressly took no position on the timeliness question itself. Thus it necessarily agreed that the District Court had jurisdiction to issue its injunction based upon its finding of untimeliness. (Statement of Position of the United States Railway Association, dated June 9, 1976, at pp. 1, 3).

Since this action clearly falls outside the jurisdiction claimed by the Special Court, that Court intruded upon questions which Congress after full consideration deemed better left for resolution by the regular federal courts.[12]

[12] In two prior cases in which the Special Court took jurisdiction, the actions involved direct challenges to USRA designations in the FSP. *See Schuler* v. *Patton,* 416 F. Supp. 1252 (1976); *Norwich & Worcester Railroad Co.* v. *United States,* 408 F. Supp. 1398 (1976).

The Special Court did not pass on contentions that it had jurisdiction under Section 209(b) of the 1973 Rail Act, as amended, or Section 209(e)(2). Neither of these sections, however, confers jurisdiction on the Special Court. Section 209(b) provides jurisdiction for all proceedings with respect to the FSP, which has not been challenged, while Section 209(e)(2) provides exclusive jurisdiction for actions seeking interpretation, alteration, or implementation of any prior orders of the Special Court conveying rail properties to ConRail. The State of Illinois has not sought any action with respect to such prior orders.

That legislative judgment is fully supported by the need to reserve the limited time and resources of the Special Court to the complex questions arising from the basic functions and purposes of the 1973 and 1976 Rail Acts. It is also consistent with the need to protect the normal jurisdiction and functions of the other federal courts.

The Special Court's unwarranted exercise of jurisdiction also caused it to usurp the authority and role of the ICC under the Rail Acts. Congress determined that basic alterations of the railroad structure of the seventeen-state region under the Rail Acts would be largely exempt from ICC jurisdiction. However, the ICC was not removed entirely from the legislative program for reorganization of the railroads. Section 206(d)(4) of the 1973 Rail Act, as amended, represents one instance of continued ICC responsibility. Congress clearly limited the exemption from ICC review of the transfer of property or operating rights from solvent railroads to ConRail to the 95-day period in which voluntary agreements to that effect could be concluded. If the conditions for exemption were not met, the ICC was given authority to review the proposals and to determine whether the use of new routes would be consistent with the public interest.

Congress could have—but did not—create the Special Court as the only forum for resolution of disputes under the 1973 and 1976 Rail Acts and for judgments as to how proposed changes in railroad operations affect public convenience and necessity. The Special Court's decision below thus conflicts with that congressional allocation of authority and responsibility.[13]

[13] The Special Court, by enjoining the resolution of this matter under the arbitration provisions of the ConRail-Illinois operating agreement, also necessarily precluded future private resolution of any question involving the Rail Acts.

As a result of the Special Court's expansive view of its jurisdiction, all actions involving the Rail Acts would have to be brought in the Special Court, thus increasing its workload and also that of this Court, since there is no intermediate court of appeal to review the Special Court's decisions.

This case requires delineation of the line separating exclusive Special Court jurisdiction from that of the other federal courts and the ICC. A decision in this case would give guidance to the Special Court and to future litigants as to the limits of the Special Court's authority and competence. Unnecessary and time-consuming jurisdictional litigation would thus be avoided, and the potential for unseemly conflicts between the Special Court and the other federal courts would be eliminated.

II. The District Court Decision Was Entitled to Res Judicata Effect in the Special Court.

The Special Court ruled that its exclusive jurisdiction over this case empowered it to refuse to give the decision of the District Court any *res judicata* effect. The State of Illinois submits that the Special Court had no authority to permit such collateral attack upon the District Court's jurisdiction.

The Special Court recognized that the jurisdictional question had been fully litigated in the District Court and that such jurisdictional decisions are entitled to *res judicata* effect. *See Stoll* v. *Gottlieb*, 305 U.S. 165, 171-172 (1938); *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66, 75-78 (1939); *Chicot Company Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 376-378 (1940). *Cf. Durfee* v. *Duke*, 375 U.S. 106 (1963). But the Special Court concluded that Congress intended its grant of exclusive jurisdiction to

void any judgment inconsistent with that jurisdiction. It cited as support for its view Secton 209(g) of the 1973 Rail Act as amended by Section 602(b) of the 1976 Rail Act, which provides that the Special Court may stay or enjoin any action or proceeding in any state court or federal court other than the Supreme Court if that action is contrary to any provision of the Rail Acts, impairs the effective implementation of the Rail Acts, or interferes with an order of the Special Court. The Court made a general conclusory finding that this litigation was impairing the implementation of the USRA's efforts by delaying them indefinitely.

If the Special Court does not have exclusive jurisdiction of this cause, as the State of Illinois contends, the District Court decision must stand unless modified by the Court of Appeals. But even assuming that the Special Court were to have exclusive jurisdiction, it still does not have the authority to upset the District Court decision.

The Rail Acts nowhere provide or imply that decisions of other federal courts are not to be given normal *res judicata* effect in the Special Court. Section 209(g) gives the Special Court power to stay or enjoin other proceedings, but that power is constrained by specific standards which must be met before such action can be taken. The Conference Report on the 1976 Rail Act explains that this section "made explicit the power of the special court as it relates to the stay of proceedings in other courts that would have an adverse effect on the reorganization process." S. Rep. No. 94-595, 94th Cong., 2d Sess. 187-188 (1976).

The power of the Special Court to disturb proceedings in other courts was carefully limited by Congress. Before the *res judicata* effect of jurisdictional decisions by

other courts can be overcome, the Special Court must make findings based on an evidentiary record of specific adverse consequences to the reorganization process. The Special Court did not—and could not—do so in this case, since the decision of the District Court was a reasonable one; submission of this localized matter to the ICC could have no adverse effect on the reorganization process.

The belated nature of ConRail's collateral attack upon the District Court's determination belies its asserted concern for the reorganization process. Immediately after the State of Illinois filed its complaint in the District Court, ConRail could have sought Special Court action on the jurisdictional issue. It did not do so. Instead, it argued the matter and lost, and then sought review in the Court of Appeals. Only at that point—five months after the beginning of this litigation—did it seek Special Court intervention. ConRail should properly be held to the forum in which it decided to argue the matter and to appellate review from that decision.

The Special Court's claimed power to nullify any decision of any lower federal court which, in its expansive view, touches upon its exclusive jurisdiction, runs counter to the legislative history of the Rail Acts and principles of federal law clearly established by decisions of this Court. *See Stoll* v. *Gottlieb*, 305 U.S., at 171-172. This extraordinary assertion of jurisdiction should be immediately curtailed by this Court.[14]

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[14] The Special Court's reliance upon *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940), reveals the breadth of its claim. In *Kalb*, this Court found that the legislation involved was intended to divest courts other than the bankruptcy court of any jurisdiction over the matters in question. In this case, however, the legislative history discloses a careful effort to restrict Special Court jurisdiction to specific

III. The Special Court Improperly Applied the Standards for a Preliminary Injunction.

The Special Court gave lip service to the traditional standards for the awarding of injunctive relief: probability of success on the merits, irreparable injury, the balance of harm to the parties, and the public interest. *See Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F. 2d 921, 925 (D.C. Cir. 1958). The Special Court, however, misapplied the standards in this case to such a degree that this Court's supervision and reversal for abuse of discretion is necessary.

Probable Success on the Merits. The Special Court strained the ordinary meaning of the language in Section 206(d)(4) to reach a desired result. That language specifies that the designation and authorization of the FSP for transfer of properties of profitable railroads to ConRail "shall terminate 95 days after the effective date of the final system plan unless, *prior to such date*, a binding agreement with respect to such properties has been entered into and concluded" (emphasis supplied). Even accepting the Special Court's adoption of the computation method of the Federal Rules of Civil Procedure, which would make February 12, 1976, the date upon which the designation would expire, the agreement was untimely. The statute plainly reads that the necessary agreement had to be fully binding *prior to such date*, that is, before February 12, 1976. The Special Court's conclusion that "prior to such date" means "prior to midnight on that date" flies

[14] (Continued)
types of actions. Moreover, as Justice Stewart observed in his opinion for the Court in *Durfee* v. *Duke*, 375 U.S. 106, 114 n. 12 (1963), the jurisdictional issue in *Kalb* had not actually been litigated in the first forum.

in the face of the language actually used (and conflicts with ConRail's own position that the deadline was midnight, February 11).[15] If Congress intended that result, it would have used the necessary language. Moreover, the District Court specifically found that the necessary labor agreements for exemption from ICC review had not been concluded by ConRail prior to executing the trackage rights agreement as required by the Rail Acts. (App. 42a); and that the agreement was not "binding" since ConRail retained an option not to effectuate the agreement up to January 1, 1977. (App. 43a).[16]

Irreparable Injury and Balance of Hardships. The Special Court noted that under special tariffs filed by ConRail and L & N effective August 31, 1976, the operations over the L & N route could continue until December 31, 1976, and that the ICC might approve a tariff extending beyond that date. It found irreparable injury, however, in its conclusion that denial of relief would frustrate ConRail's statutory task of improving the efficiency of railroad operations and the public interest in achieving an efficient, viable transportation service.

ConRail, however, introduced no evidence to support these general conclusions. The Special Court made no attempt to ascertain whether the possible delay in using the L & N track during ICC proceedings or ultimate ICC disapproval of the operations would frustrate the basic

[15] *See, e.g.*, Memorandum of Consolidated Rail Corporation in Support of Its Motion for a Preliminary Injunction (filed in the Special Court), at p. 13.

[16] The Special Court erroneously stated in its opinion that the parties agreed that all necessary labor protective agreements had been executed as of February 12, 1976.

objectives of the legislation. The Special Court merely adopted the general, conclusory arguments in ConRail's briefs about the injury that would result.[17] ConRail's view of "irreparable injury" is unique:

> "Conrail's statutory mandate is undermined each day that Conrail is unable to provide rail service over the L & N via trackage rights as contemplated by the FSP. Such harm is not capable of measurement, and cannot be compensated by damages. Moreover, to the extent that Conrail's operations pursuant to the FSP represent public interest planning by USRA and affirmative congressional approval, any deviation from the provision of rail service contemplated by the Final System Plan and approved by the Congress does continuing harm both to Conrail and to the public interest." Memorandum of Consolidated Rail Corporation in Support of Its Motion for a Preliminary Injunction, at p. 18.

The Special Court simply adopted ConRail's bald assertion that any delay in implementing ConRail's interpretation of the law causes irreparable harm to the public in-

[17] The Special Court stressed the FSP's conclusion that the track of the excluded portion was in poor condition and would require rehabilitation by ConRail at great expense if conveyed to ConRail. The drafting of the FSP was completed in July, 1975, and since then significant developments on this matter occurred which were ignored by the Special Court, although not by the District Court. The State of Illinois adopted a State Rail Plan providing for the rehabilitation of the track, and the ConRail-Illinois agreement provides for satisfactory rehabilitation through State subsidies. Expert testimony in the District Court indicated that rehabilitation could be completed within one year. (Testimony of Glenn L. Downing, Transcript of Proceedings of July 8, 1976, at p. 96). If the ConRail traffic were not diverted, Illinois could apply resulting profits to its rehabilitation program.

terest.[18] But this litigation concerns the propriety of that interpretation of the FSP and the Rail Acts. If the ConRail-L & N agreement was not timely, Congress has provided that it cannot be implemented without prior ICC approval. The public interest will be best protected by a correct construction and application of that congressional mandate, however ConRail may view the outcome.

In contrast to the Special Court's speculation, the District Court's decision rested on an extensive evidentiary record which revealed the actual monetary loss to the State of Illinois from the diversion and a lack of harm to ConRail from enjoining the diversion. Glenn L. Downing, a transportation and economic consultant (who testified as an expert witness in the District Court), submitted an affidavit in the Special Court stating that ConRail operations over the Penn Central line would be *less* expensive than operations over the L & N track:

> "I have also calculated the costs incurred by ConRail in its operation over the Cairo line and those which would be incurred in its operation using trackage rights over the L & N line. These calculations include consideration of the fewer crews, the trackage rights charge, the greater locomotive requirements and the higher average speed of the L & N line in comparison to the Cairo line. Conrail's costs on the L & N line would be over $100 per day more than the costs over the Cairo line even after consideration of the net revenues credited to Illinois in accordance with the Conrail/Illinois contract." Affidavit of Glenn

[18] However, as stressed in Wright & Miller, *Federal Practice and Procedure: Civil* §2948, at pp. 436-437:

> There must be a likelihood that irreparable harm will occur. Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant.

L. Downing, attached to the Memorandum of the State of Illinois in Opposition to Motion of Conrail for Preliminary Injunction.

This evidence refutes any claim of irreparable injury by ConRail from using the Penn Central track during the pendency of the litigation or until ICC consideration of ConRail's proposal to use the L & N track. ConRail did not contradict this evidence, and the Special Court ignored it in its opinion.

Downing also estimated the net loss in revenue to the State of Illinois from the diversion of traffic to be more than $1000 per day. Based on evidence submitted by the other petitioners, the District Court found irreparable loss to them from the diversion. The Special Court's comment that the damage to the State of Illinois would be merely that contemplated by the FSP begs the question whether the FSP and the Rail Acts were being lawfully followed. The fact that the losses might have also resulted from lawful action does not make them any less irreparable if resulting from violations of the law. The balance of hardships clearly favors relief to the State of Illinois.

The Special Court's issuance of the preliminary injunction was a glaring abuse of discretion. Even more importantly, the Special Court appears to have read the Rail Acts as creating a favored status in the courts for ConRail and exempting it from the traditional requirements for securing injunctive relief. Only this Court can correct that misconstruction of federal law.

CONCLUSION

The State of Illinois asks the Supreme Court to accept for plenary review the foregoing questions that fundamentally affect the implementation of the railroad reorganization program and the administration of the federal judicial system, and to reverse the decision of the Special Court.

160 North LaSalle Street
Chicago, Illinois 60601
(312) 793-2501

WILLIAM J. SCOTT
Attorney General
State of Illinois

4 West Seminary Street
Danville, Illinois 61832
(217) 443-0304

JOHN P. MEYER
Special Assistant Attorney General

One IBM Plaza — Suite 3200
Chicago, Illinois 60611
(312) 467-6540

LEE A. FREEMAN, JR.
Special Assistant Attorney General

2300 South Dirksen Parkway
Springfield, Illinois 62764
(217) 782-3215

KEVIN B. McCARTHY
Assistant Chief Counsel
Illinois Department of Transportation
Counsel for Petitioners

DATED: December 17, 1976

APPENDIX A

Statutes

Section 206(d)(4) of the Regional Rail Reorganization Act of 1973 (1973 Rail Act), as amended by Section 607(o) of the Railroad Revitalization and Regulatory Reform Act of 1976 (1976 Rail Act) [45 U.S.C.A. §716(d)(4)]:

> (4) Where the final system plan designates specified rail properties of a railroad in reorganization in the region, or of a railroad leased, operated, or controlled by a railroad in reorganization in the region, to be offered for sale to and operated by a profitable railroad operating in the region, such designation shall terminate 7 days after February 5, 1976, unless, prior to such date, such profitable railroad has notified the Association in writing of its acceptance of such offer. Any such offer may be modified until the date of acceptance thereof, unless such modification results in an offer for the sale of rail properties at less than the net liquidation value thereof. Where the final system plan designates specified rail properties of a profitable railroad operating in the region as authorized to be offered for sale or lease to the Corporation or to other profitable railroads operating in the region, such designation and authorization shall terminate 95 days after the effective date of the final system plan unless, prior to such date, a binding agreement with respect to such properties has been entered into and concluded.

Section 208(d) of the 1973 Rail Act, as amended by Section 601(e) of the 1976 Rail Act [45 U.S.C.A. §718(d)]:

> (d) *Additions.* — (1) The supplemental report, dated September 18, 1975, to the final system plan, and the provisions of the Association's official errata

supplement to the final system plan, dated December 1, 1975, including all designations made therein, shall be treated for all purposes as if they had been part of and included in the final system plan adopted by the Association and reviewed by the Congress. The final system plan shall, for all purposes, be deemed to be approved as modified and amended by such supplemental report and such supplement.

(2) The Association may, upon petition of any State, modify the final system plan to make further designations with respect to rail properties of railroads in reorganization in the region designated for transfer to the Corporation under such plan, if such designations (A) are likely to result in improved rail service on such rail properties and connecting rail properties, and (B) would not materially impair the profitability of the Corporation. Such designations, including designations of such rail properties to a State, a profitable railroad, or a responsible person, may be made at any time prior to delivery of the final system plan to the special court under section 719(c) of this title. Such further designations shall be treated for all purposes as if they had been included in the final system plan adopted by the Association and reviewed by the Congress, and the final system plan shall for all purposes be deemed to be approved as modified by such designations. Any action of the Association with respect to any such petition shall not be subject to review by any court.

(3)(A) Within 20 days after February 5, 1976, the Association may, by notice to the Congress and by publication in the Federal Register, modify, supplement, or add to the designations of rail properties in the final system plan if the Association finds such actions are necessary to—

(i) achieve the efficient implementation of the final system plan, or

(ii) provide for the offer to profitable railroads of rail properties designated in the final

system plan to the Corporation, if such properties are not essential in the operation of other rail properties of the Corporation but are or would be integrally related to the operation of rail properties of (or which are offered pursuant to the final system plan to) such profitable railroad, or

(iii) provide for the designation of additional rail properties to the Corporation or to a subsidiary thereof to enable the Corporation to serve efficiently a line of railroad designated to the Corporation in the final system plan if such line does not connect with any other line of railroad so designated to the Corporation or if such line would be served more efficiently as a consequence of such designation.

Any designation to a profitable railroad pursuant to this paragraph shall comply with the second sentence of section 716(d)(4) of this title, and shall only be made upon a finding by the Association that such designation is integrally related to an offer of rail properties to a profitable railroad in the final system plan, that the goals of the final system plan require that the rail properties be operated as a part of the rail properties included in such offer, and that the implementation of such designation will not materially and adversely affect the impact of such offer on the profitability of the Corporation or any profitable railroad operating in the region. Any designation to a profitable railroad pursuant to this subsection, which amends any prior offer, shall terminate 30 days after February 5, 1976, unless, prior to such date, such profitable railroad has notified the Association in writing of its acceptance of such amendment to the prior offer.

(B) If a line of railroad or any segment thereof is designated for rail service in the final system plan, no designation may be made by the Association pursuant to this paragraph which would result in such line or segment not being so designated. Any desig-

nations made pursuant to this paragraph shall be treated for all purposes as if they had been included in the final system plan adopted by the Association and reviewed by the Congress. The final system plan shall for all purposes be deemed to be approved as amended by such designations.

(C) Any designations made pursuant to this paragraph shall not be subject to review by any court.

(D) Any labor agreements entered into under section 778 of this title shall be subject to further negotiations for any modifications which may be necessary to implement designations made pursuant to this paragraph. As amended Pub.L. 94-210, Title VI, § 601(e), Feb. 5, 1976, 90 Stat. 84.

Section 209(b) of the 1973 Rail Act, as amended by Section 602(a) of the 1976 Rail Act [45 U.S.C.A. §719(b)]:

(b) *Special court.*—Within 30 days after January 2, 1974, the Association shall make application to the judicial panel on multi-district litigation authorized by section 1407 of Title 28 for the consolidation in a single, three-judge district court of the United States of all judicial proceedings with respect to the final system plan. Within 30 days after such application is received, the panel shall make the consolidation in a district court (cited herein as the "special court") which the panel determines to be convenient to the parties and the one most likely to be able to conduct any proceedings under this section with the least delay and the greatest possible fairness and ability. Such proceedings shall be conducteed by the special court which shall be composed of three Federal judges who shall be selected by the panel, except that none of the judges selected may be a judge assigned to a proceeding involving any railroad in reorganization in the region under section 205 of Title 11. The special court is authorized to exercise the powers of a district judge in any judicial district with respect to such proceedings and such powers shall include those of a reorganization court. The special court shall have the power to order the conveyance of rail properties of railroads leased, operated, or controlled by a railroad in reorganization in the region. The special court may issue rules for the conduct of any proceedings under this section and under section 745 of this title, including rules with respect to the time within which motions may be filed, and with respect to appropriate representation of interests not otherwise represented (including the Secretary with respect to a petition by the Association in the case of a proposal developed by the Secretary, under such section 745 of this title). No determination by the panel under this subsection may be reviewed in any court.

Section 209(e) of the 1973 Rail Act, as amended by Section 602(b) of the 1976 Rail Act [45 U.S.C.A. §719(e)]:

(e) Original and exclusive jurisdiction.—(1) Notwithstanding any other provision of law, any civil action—

(A) for injunctive or other relief against the Association from the enforcement, operation, or execution of this chapter or any provision thereof, or from any action taken by the Association pursuant to authority conferred or purportedly conferred under this chapter;

(B) challenging the constitutionality of this chapter or any provision thereof;

(C) challenging the legality of any action of the Association, or any failure of the Association to take any action, pursuant to authority conferred or purportedly conferred under this chapter;

(D) to obtain, inspect, copy, or review any document in the possession or control of the As-

sociation that would be discoverable in litigation pursuant to section 743(c) of this title;

(E) brought after a conveyance, pursuant to section 743(b) of this title, to set aside or annul such conveyance or to secure in any way the reconveyance of any rail properties so conveyed; or

(F) with respect to continuing reorganization and supplemental transactions, in accordance with section 745 of this title;

shall be within the original and exclusive jurisdiction of the special court. The special court shall not hear or determine any such action prior to the date of conveyance, pursuant to section 743(b)(1) of this title, except as the Constitution may require. Relief shall not be granted in any action referred to in subparagraph (A), (C), or (E) unless the person seeking such relief establishes that the Association acted in reckless or deliberate disregard of applicable law.

(2) The original and exclusive jurisdiction of the special court shall include any action, whether filed by any interested person or initiated by the special court itself, to interpret, alter, amend, modify, or implement any of the orders entered by such court pursuant to section 743(b) of this title in order to effect the purposes of this chapter or the goals of the final system plan. During the pendency of any proceeding described in this paragraph, the special court may enter such orders as it determines to be appropriate, including orders enjoining, restraining, conditioning, or limiting any conveyance, transfer, or use of any assset or right which is subject to such an order or which is at issue in such a proceeding, or which involves the enforcement of any liens or encumbrances upon such assets or rights. Any orders pursuant to this paragraph which interpret, alter, amend, modify, or implement orders entered by the special court shall be final and shall not be restrained or enjoined by any court.

(3) A final order or judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of this chapter, in whole or in part, or of any action taken under this chapter, shall be reviewable by direct appeal to the Supreme Court of the United States in the same manner that an injunctive order may be appealed under section 1253 of Title 28. Such review is exclusive and any petition or appeal shall be filed not more than 20 days after entry of such order or judgment.

Section 209(g) of the 1973 Rail Act, as amended by Section 602(b) of the 1976 Rail Act [45 U.S.C.A. §209(g)]:

(g) Stay of court proceedings.—The special court may stay or enjoin any action or proceeding in any State court or in any court of the United States other than the Supreme Court if such action or proceeding is contrary to any provision of this chapter, impairs the effective implementation of this chapter, or interferes with the execution of any order of the special court pursuant to this chapter.

Section 508(b) of the 1973 Rail Act, as amended by Section 617 of the 1976 Rail Act [45 U.S.C. §778(b)]:

(b) Selling railroads.—A selling railroad shall offer such employment and shall provide such employment protection to each of its employees who are adversely affected by such sale, pursuant to agreements to be entered into between it and the representatives of such employees prior to said sale: *Provided*, That (1) the protection and benefits provided for protected employees in such agreements shall be the same as those specified in section 775 of this title, and (2) unless and until such agreements are reached, the

selling railroad shall not enter into selling agreements pursuant to section 716(d) of this title.

Section 601(b)(1) of the 1973 Rail Act, as amended by Section 618(b) of the 1976 Rail Act [45 U.S.C.A. §791(b)(1)]:

> The provisions of the Interstate Commerce Act and the Bankruptcy Act (11 U.S.C. 205 et seq.) are inapplicable (A) to actions taken under this chapter to formulate and implement the final system plan where such action was in compliance with the requirements of such plan, and (B) to actions taken under this chapter to formulate or implement any supplemental transaction.

49 U.S.C. §1, par. (18):

(18)(a) No carrier by railroad subject to this chapter shall—

> (i) undertake the extension of any of its lines of railroad or the construction of any additional line of railroad;
>
> (ii) acquire or operate any such extension or any such additional line; or
>
> (iii) engage in transportation over, or by means of, any such extended or additional line of railroad,

unless such extension or additional line of railroad is described in and covered by a certificate which is issued by the Commission and which declares that the present or future public convenience and necessity require or will be enhanced by the construction and operation of such extended or additional line of railroad. Upon receipt of an application for such a certificate, the Commission shall (A) send a copy of application to the chief executive officer of each State that would be directly affected by the construction or operation of such extended or additional line, (B) send an accurate and understandable summary of such application to a newspaper of general circula-

tion in such affected area or areas with a request that such information be made available to the general public, (C) cause a copy of such summary to be published in the Federal Register, (D) take such other steps as it deems reasonable and effective to publicize such application, and (E) indicate in such transmissions and publications that each interested person is entitled to recommend to the Commission that it approve, disapprove, or take any other specified action with respect to such application.

(b) The Commission shall establish, and may from time to time amend, rules and regulations (as to hearings and other matters) to govern applications for, and the issuance of, any certificate required by subdivision (a). An application for such a certificate shall be submitted to the Commission in such form and manner and with such documentation as the Commission shall prescribe. The Commission may—

> (i) issue such a certificate in the form requested by the applicant;
>
> (ii) issue such a certificate with modifications in such form and subject to such terms and conditions as are necessary in the public interest; or
>
> (iii) refuse to issue such a certificate.

(c) Upon petition or upon its own initiative, the Commission may authorize any carrier by railroad subject to this chapter to extend any of its lines of railroad or to take any other action necessary for the provision of adequate, efficient, and safe facilities for the performance of such carrier's obligations under this chapter. No authorization shall be made unless the Commission finds that the expense thereof will not impair the ability of such carrier to perform its obligations to the public.

(d) Carriers by railroad subject to this chapter may, notwithstanding this paragraph and section 5 of this title, and without the approval of the Commission, enter into contracts, agreements, or other

arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The authority granted to the Commission under this paragraph shall not extend to the construction, acquisition, or operation or spur, industrial, team, switching, or side tracks if such tracks are located or intended to be located entirely within one State, and shall not apply to any street, suburban, or interurban electric railway which is not operated as part of a general system of rail transportation.

(e) Any construction or operation which is contrary to any provision of this paragraph, of any regulations promulgated under this paragraph, or of any terms and conditions of an applicable certificate, may be enjoined by an appropriate district court of the United States in a civil action commenced and maintained by the United States, the Commission, or the attorney general or the transportation regulatory body of an affected State or area. Such a court may impose a civil penalty of not to exceed $5,000 on each person who knowingly authorizes, consents to, or permits any violation of this paragraph or of the conditions of a certificate issued under this paragraph.

49 U.S.C. §5, par. (2):

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) or paragraph (3) of this paragraph—

* * *

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each

State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

* * *

APPENDIX B

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

CONSOLIDATED RAIL CORPORATION,

Plaintiff,

v.

STATE OF ILLINOIS, et al.,

Defendants.

Special Court Civil Action No. 76-9

Before FRIENDLY, *Presiding Judge,* WISDOM, and THOMSEN, *Judges.*

WISDOM, *Judge:*

This action raises important questions relating to the Special Court's exclusive jurisdiction, construction of the Rail Act,[1] and the integrity of the Final System Plan (FSP).[2] ConRail moved in this Court for a declaratory judgment and for injunctive relief against enforcement of a permanent injunction issued April 18, 1976, in State of Illinois, et al.[3] v. Consolidated Rail Corp., No. 76-2-042 (E.D. Ill. 1976). In that case the district court enjoined

[1] The Regional Rail Reorganization Act of 1973, as amended.

[2] As in previous opinions of this Court the following abbreviations are used:

FSP	—	Final System Plan
USRA	—	United States Railway Association
ConRail	—	Consolidated Rail Corporation
L & N	—	Louisville and Nashville Railroad

[3] As appears in the style of this case, the defendants are the State of Illinois, four Illinois counties, two cities, and a state commission. For convenience, these defendants are referred to collectively as the State of Illinois or the State.

ConRail and the L & N from operating ConRail trains or equipment, under certain trackage agreements, over the lines of the L & N between Carmi and Danville, Illinois, by way of Evansville, Indiana, until the Interstate Commerce Commission approved such operations.[4] In this Court the State of Illinois moves to dismiss ConRail's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. We grant the declaratory judgment and preliminary injunction sought by ConRail. We deny the State's motion to dismiss the complaint.

I. Factual Background

The dispute in this case concerns 63.4 miles of track between Paris and Lawrenceville, Illinois. This track is a segment of the Cairo Branch which, before April 1, 1976, was owned by the Penn Central Transportation Company. The Cairo Branch is located within the State of Illinois and extends from Cairo northward through Carmi, Mt. Carmel, Lawrenceville, Paris, and Danville to Chicago. This Branch is one of several north-south freight lines connecting the coal fields of southern Illinois and Indiana with the Chicago area. It is a light density line in "a terrible state of repair";[5] if used as a route for north-south through traffic, it would have to be extensively upgraded. As a consequence, in constructing the FSP the USRA considered the feasibility of routing ConRail traffic over connecting, well-maintained lines of solvent carriers as an alternative to conveyance of the entire

[4] Section 601(b) exempts from the operation of the Interstate Commerce Act actions that are in compliance with the requirements of the FSP.

[5] I FSP at 30. ConRail asserts that $6 million would be required initially to upgrade the track and roadbed.

Cairo Branch to ConRail. After extensive public hearings on the subject, USRA determined that ConRail traffic destined for Chicago should bypass part of the Cairo Branch and be routed over connecting trackage of solvent carriers—either on all L & N trackage from Carmi, Illinois east to Evansville, Indiana, and then north to Vincennes, Indiana and Danville, Illinois; or from Carmi to Lawrenceville, Illinois on ConRail track, east to Vincennes on B & O track and then north to Danville on L & N track.[6] In either event, through freight service to Chicago would not travel over the Paris-Lawrenceville section of the Cairo Branch but instead over the Vincennes-Danville track of the L & N. In exchange the L & N would be offered trackage rights into the southern Illinois coal fields on lines designated for conveyance to ConRail. The result would enable ConRail to consolidate its coal flow from southern Illinois and southern Indiana to Chicago over an existing high-capacity and well-maintained railroad. The L & N would be benefited by payments from ConRail for the use of the tracks; ConRail would avoid the expense of upgrading the Cairo line. The rerouting would therefore improve the operating efficiency of ConRail and the shipper service for the area served. I FSP at 30.

Accordingly, in the FSP the USRA designated to ConRail that portion of the Cairo Branch extending from Cairo to Lawrenceville. Beyond Lawrenceville, however, the 63.4 mile portion northward to Paris was designated to ConRail *only* if the L & N trackage rights "cannot be obtained." *See* II FSP at 65-69. "[I]f the necessary trackage rights over the L & N are acquired", the bypassed Lawrenceville to Paris portion of the Cairo Branch

[6] *See* I FSP 29-30, 267, 333, 334, 272-73; II FSP 65-67.

would remain the property of the Penn Central and be available for subsidy by the State of Illinois under Section 304 of the Rail Act.[7] It is clear then that ConRail's use of L & N trackage rights for the 63.4 miles in dispute was part of USRA's master plan and the designation of the offers of L & N's trackage rights could be defeated only if ConRail failed to obtain the timely execution of an agreement with L & N.

The trackage rights contract was executed by ConRail and L & N covering the L & N tracks north to Danville. The contract was executed on February 10, 1975, but was dated February 12, 1975. The State of Illinois contends that the agreement was invalid, because it was not concluded within the limitation period of Section 206(d)(4) (95 days from November 9, 1975, the effective date of the FSP). *See* Part IV of this opinion.

Beginning on April 1, 1976, ConRail began diverting its through coal traffic from the old Cairo Branch to the L & N tracks via Carmi-Evansville-Vincennes. On August 5, 1976, the State obtained a temporary restraining order in the district court in the eastern district of Illinois. On August 18, the district court granted a permanent injunction against ConRail, holding that the L & N trackage agreement was not timely concluded

[7] Section 304 of the Rail Act contemplates subsidy operation of rail lines otherwise subject to abandonment by reason of those lines having been excluded from the FSP for conveyance to ConRail or a solvent carrier. ConRail reached an operating agreement with the State of Illinois on March 29, 1976, whereby ConRail would provide a rail freight service over the Paris-Lawrenceville section of the old Penn Central Cairo branch, the segment not conveyed to ConRail, in exchange for a subsidy from Illinois. The effective date of this agreement was April 1, 1976.

within the meaning of § 206(d)(4) of the Act and forbidding ConRail from continuing such operations without Interstate Commerce Commission (I.C.C.) approval under 49 U.S.C. § 1 (18) ConRail appealed to the Seventh Circuit Court of Appeals on August 18. Although ConRail sought a stay of execution from the district court, which was denied, it did not seek a stay from the Seventh Circuit.

The interim solution sought by ConRail and L & N, while the appeal was pending in the Seventh Circuit, was the publication of a joint tariff on August 25 and 26 which would permit operation of ConRail coal trains over the same L & N trackage. The State of Illinois contested the tariff pursuant to I.C.C. rules and requested that the tariff be suspended pending investigation. The I.C.C. declined this request, but did begin an investigation. The tariff became effective on August 31, 1976, and will expire on December 31, 1976.

On September 1, 1976, before ConRail's request for a preliminary injunction in the instant proceeding, Illinois served on ConRail a notice of arbitration, purportedly authorized under Article XII of the ConRail-Illinois Operating Agreement, *see* footnote 7. The notice alleged that the issue of ConRail's diversion of coal traffic from the Lawrenceville-Paris section was arbitrable and that the diversion was in violation of the agreement. ConRail's motion requests injunctive relief to restrain the State of Illinois from proceeding with its notice of arbitration. The State of Illinois seeks dismissal of ConRail's complaint and enforcement of the arbitration.

II. Jurisdiction

The threshold question in this proceeding is whether the action brought in the Iilinois district court was within

our exclusive jurisdiction. Although the arguments focused on several sections of the Act[8] as providing, vel non,

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[8] The other sections claimed to provide bases for exclusive jurisdiction are §§209(b) and (e)(2).

Section 209(b) states:

> (b) SPECIAL COURT.—Within 30 days after the date of enactment of this Act, the Association shall make application to the judicial panel on multi-district litigation authorized by section 1407 of title 28, United States Code, for the consolidation in a single, three-judge district court of the United States of all judicial proceedings with respect to the final system plan. Within 30 days after such application is received, the panel shall make the consolidation in a district court (cited herein as the "special court") which the panel determines to be convenient to the parties and the one most likely to be able to conduct any proceedings under this section with the least delay and the greatest possible fairness and ability. Such proceedings shall be conducted by the special court which shall be composed of three Federal judges who shall be selected by the panel, except that none of the judges selected may be a judge assigned to a proceeding involving any railroad in reorganization in the region under section 77 of the Bankruptcy Act (11 U.S.C. 205). The special court is authorized to exercise the powers of a district judge in any judicial district with respect to such proceedings and such powers shall include those of a reorganization court. The special court shall have the power to order the conveyance of rail properties of railroads leased, operated, or controlled by a railroad in reorganization in the region. The special court may issue rules for the conduct of any proceedings under this section and under section 305 of this Act, including rules with respect to the time within which motions may be filed, and with respect to appropriate representation of interests not otherwise represented (including the Secretary with respect to a petition by the Association in the case of a proposal developed by the Secretary, under such section 305). . . .

foundations for our claim of exclusive jurisdiction, the provision most obviously pertinent is § 209(e)(1)(C) which states that:

> Notwithstanding any other provision of law, any civil action . . . challenging the legality of any action of the Association, or any failure of the Association to take any action, pursuant to authority conferred or purportedly conferred under this Act . . . shall be within the original and exclusive jurisdiction of the special court.

The statutory language on its face seems clear in requiring a challenge to Association action or inaction.

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[8] (Continued)
Section 209(e)(2) states:

> (e) ORIGINAL AND EXCLUSIVE JURISDICTION.—
>
> . . .
>
> (2) The original and exclusive jurisdiction of the special court shall include any action, whether filed by any interested person or initiated by the special court itself, to interpret, alter, amend, modify, or implement any of the orders entered by such court pursuant to section 303(b) of this Act in order to effect the purposes of this Act or the goals of the final system plan. During the pendency of any proceeding described in this paragraph, the special court may enter such orders as it determines to be appropriate, including orders enjoining, restraining, conditioning, or limiting any conveyance, transfer, or use of any asset or right which is subject to such an order or which is at issue in such a proceeding, or which involves the enforcement of any liens or encumbrances upon such assets or rights. Any orders pursuant to this paragraph which interpret, alter, amend, modify, or implement orders entered by the special court shall be final and shall not be restrained or enjoined by any court.

In light of our disposition, we need not consider whether these sections would apply in the present context.

The critical determination is, then, the extent to which USRA's actions or inactions were challenged in the matters that led to the Illinois district court proceeding. USRA did not, in terms, require ConRail and L & N to conclude an agreement, nor was the original designation by USRA of L & N trackage challenged. In addition, the Illinois-ConRail Operating Agreement was not negotiated by USRA, nor does the interpretation of the agreement directly involve USRA.

Inquiry in greater depth persuades us, however, that the district court action violated our exclusive jurisdiction. The basis of the Illinois complaint that I.C.C. approval was required for Carmi-Evansville-Vincennes-Danville operations by ConRail was that the L & N trackage agreement was not timely under §206(d)(4). The fact of untimeliness, according to II FSP, pp. 65-69, triggers the alternative requirement that the Paris-Lawrenceville segment of the old Penn Central be considered automatically designated. As was said in regard to Segment 605a, FSP, a portion of the Paris-Lawrenceville line: "If the necessary trackage rights over the L & N *cannot* be obtained, this portion of the Cairo Branch *shall* be transferred to Consolidated Rail Corp." (emphasis added). If Illinois were correct that the ConRail-L & N trackage agreement was not timely concluded, the Paris-Lawrenceville segment of the Cairo line should have been conveyed to ConRail, for the condition necessary for its effective designation was fulfilled. The action by Illinois in the district court, then, implicitly challenged the legality of the USRA's *not* certifying the Paris-Lawrenceville Segment for conveyance.

As further support for the conclusion that §209(e)(1)(C) applies, we note that the district court proceeding drew

into question determinations as to the validity of the ConRail-L & N agreement in that USRA failed to designate Cairo pursuant to §208(d) which allows for additional designations. Again USRA's failure to include the Paris-Lawrenceville segment is implicitly challenged.

We conclude that USRA's actions were sufficiently connected to the proceedings in the Illinois district court to satisfy the requirements of §209(e)(1)(C). We note that any possible apprehension based on our determination today that the Special Court will be inundated with contract claims that bear a relation to the Act is misconceived. The major fact in the present case that allows for exclusive jurisdiction is the conditional designation of the Paris-Lawrenceville segment of the Cairo line in the FSP. It is USRA's failure to certify this portion of the Cairo line for conveyance that provides its connection to this action. Absent the alternative designation, there would be little basis for finding that the district court action was a challenge to the actions of the USRA.[9]

We need not pause long in our consideration whether the well-pleaded complaint rule, applicable generally to the interpretation of "arising under" in 28 U.S.C. §§ 1331, 1338, applies here to §209(e). There is no apparent reason, apart from considerations of symmetry, why it should apply in light of the extraordinary statutory power granted the Special Court to protect its jurisdiction and the need for this Court to preserve the integrity of the FSP and USRA's determinations in pursuance of the FSP and of the Act.

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[9] We express no view as to whether USRA's failure to make supplemental designations would alone be sufficient to sustain our exclusive jurisdiction as the issue is not before us.

III. Res Judicata

Even if the assumption of jurisdiction by the district court was improper, *Stoll* v. *Gottlieb,* 305 U.S. 165 (1938) and its progeny might suggest that principles of res judicata should bar collateral attack on the Illinois judgment.[10] Examination of the basis of the *Stoll* rule, however, convinces us that its application in the present context is inappropriate.

The basic problem presented is the extent to which litigated questions[11] of subject matter jurisdiction are to be protected from collateral attack. Although the policies of terminating litigation, avoiding inconsistent results, and repose, which support application of res judicata to questions of subject matter jurisdiction, may vindicate the general rule that litigated questions of subject matter jurisdiction cannot be collaterally attacked, the policy basis for the rule should make us wary of its procrustean application. Here, countervailing policy considerations support the conclusion that Congress, in passing the Act and §209(e) in particular, intended to void determinations made by other courts, when these determinations

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[10] *United States* v. *UMW,* 330 U.S. 258 (1947); *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U.S. 371 (1940); *Treinies* v. *Sunshine Mining Co.,* 308 U.S. 66 (1939); *Des Moines Navigation & R.R.* v. *Iowa Homestead Co.,* 123 U.S. 552 (1887); *cf. Durfee* v. *Duke,* 375 U.S. 106 (1963); *Coe* v. *Coe,* 334 U.S. 378 (1948).

[11] While it may be that non-litigated questions of subject matter jurisdiction are given the same res judicata effect as litigated questions, *see Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U.S. 371 (1940), we need not address that issue here. The question of subject matter jurisdiction was argued in the district court.

were reserved for our exclusive consideration.[12] The legislative mandate overpowers the general rule.

Kalb v. *Feuerstein,* 308 U.S. 433 (1940), is the leading decision for the principle that the legislature may void judgments. In this case the Feuersteins began foreclosure proceedings against Kalb, a farmer, and his wife. Judgment of foreclosure was entered in the County Court of Walworth, Wisconsin. Congress then passed the Frazier-Lemke Act, and farmer Kalb's petition for composition and extension of time pursuant to that Act was duly filed and approved by the federal district court. The Frazier-Lemke Act was subsequently found unconstitutional in May of 1935. The federal court dismissed Kalb's petition and subsequently the sheriff sold his farm. The second Frazier-Lemke Act was then passed, the Kalbs' petition reinstituted, and after this, the sheriff's sale confirmed by the county court. The sheriff then ejected the Kalbs from the mortgaged farm.

The basic claim by the Kalbs was that the reinstatement of the petition under the second Frazier-Lemke Act divested the county court of jurisdiction to complete the foreclosure. On appeal the Supreme Court held that the statute specifically created an exception to the principle forbidding collateral attack. This was based on an interpretation of the purpose of the Bankruptcy Act, 11 U.S.C. 203 (Supp. 1938), specifically § 75. The question of subject matter jurisdiction was not litigated, but Justice

[12] *See* Dobbs, The Validation of Void Judgments: The Bootstrap Principle, 53 Va. L. Rev. 1003, 1241 (1967). *Cf.* Bosky & Braucher, Jurisdiction and Collateral Attack, 40 Colum. L. Rev. 1006 (1940); but cf., P. Bator, P. Mishkin, D. Shapiro, and H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System, pp. 841-44 (2d ed. 1973).

Black stated that this would make no difference: "[C]onsiderations as to whether the issue of jurisdiction was actually contested in the county Court, or whether it could have been contested, are not applicable where the plenary power of Congress . . . has been exercised as in this Act." 308 U.S. at 444. (Footnotes omitted).

Although *Kalb* certainly does not control our determination here, the analogy is persuasive. The Rail Act proposes to cure a depressing, deteriorating situation in rail transportation in the northeast region of the country. This Special Court bears primary responsibility in making certain that the work of the USRA is implemented effectively. The exclusive jurisdiction sections make clear that Congress desired that one court make these necessary determinations. It is not every challenge relating to the Act that Congress brought within our exclusive province but only those where the critical nature of the determination demands the consistent interpretation possible only when review is concentrated in a single court. The ambit of the Special Court's exclusive jurisdiction was carefully considered by Congress. Congressional concern focused on providing for exclusive jurisdiction where the Special Court's central functions under the Rail Act were concerned while narrowing the exclusive jurisdiction to oust problems which could be effectively dealt with by other courts. The assumption was then that certain matters would be exclusively attended to by the Special Court, and congressional efforts were directed to determining which matters warranted sensitive treatment.

As originally framed in the 1975 Senate bill, exclusivity of the Special Court's jurisdiction was extremely broad, including virtually any action purportedly authorized by the Act. There was no limitation of the exclusive

jurisdiction to challenges of the Railway Association's actions. S. 2718, 94th Cong., 1st Sess., § 602(b), would have added to §209 of the Rail Act a provision that read:

> (e) Civil Actions--(1) Notwithstanding any other provision of law, any action—
>
> (A) for injunctive or other relief from the enforcement, operation, or execution of [the] Act or any provision thereof, or from any action taken pursuant to authority purportedly conferred under this Act;
>
> (B) challenging . . . the illegality of any action or any failure to take action pursuant to authority conferred or purportedly conferred under this Act;
>
> (C) to enforce or declare any rights under this Act;
>
> . . .
>
> shall be within the original and exclusive jurisdiction of the special court.

The Senate Report referring to this broad language noted that the new subsection (e) provided "that actions brought to challenge or to enforce or declare rights under or pursuant to the Act, the final system plan and the implementation of the final system plan, are within the original and exclusive jurisdiction of the special court. The jurisdiction of the special court extends to actions by interested parties or by the special court on its own motion, which may be required to give effect to the purposes of the Act and the goals of the final system plan." S. Rep. No. 499, 94th Cong., 1st Sess. at 83.

The House bill, with similar language, also proposed creating a broad scope for Special Court exclusive jurisdiction. Section 910(h) of H.R. 10979 would have added the following language to §209:

> (e) INJUNCTIVE AND DECLARATORY ACTIONS.—Notwithstanding any other provisions of law, any action—
>
> (1) for injunctive or other relief from operation, or execution of any part of this Act or from any action taken pursuant to authority purportedly conferred under this Act,
>
> (2) for a declaratory judgment .. . of the illegality of any action or of any failure to take action pursuant to authority conferred or purportedly conferred under this Act, or
>
> (3) to enforce or declare rights under this Act, shall be within the exclusive jurisdiction of the special court.

In Conference the language of the Senate and House bills was pruned by adding the requirement for exclusive jurisdiction that the suit be one challenging some action of the United States Railway Association, or seeking relief against USRA, rather than, for example, against ConRail, an interested solvent transferee, or a "financially responsible person". The Conference noted: "The conference substitute eliminates the provision giving the special court exclusive jurisdiction over any action to enforce or declare rights under the Rail Act of 1973. Many actions covered by this provision undoubtedly would be within the exclusive jurisdiction of the special court under other provisions of this bill, but still others may be of no concern to the central functions of the special court under the Rail Act of 1973, as amended." Report of the Committee of Conference, H.R. Rep. No. 781, at 188 (1976). The limitations on exclusive jurisdiction imposed in Conference express Congress's view of the Special Court's "central functions". This careful inquiry by Congress requires the conclusion that USRA action is not to be interfered with by any other court, a goal that is best

implemented by viewing the Act as voiding judgments inconsistent with our exclusive jurisdiction. Were we to view the Act differently, serious impediments would exist impairing the effective implementation of the Act. The present case is a paradigm of the kind of situation where our early unrestricted intervention is necessary; otherwise the implementation of USRA's efforts will be delayed indefinitely.

Congress found, as stated in §101(a), that essential rail service is threatened with cessation because of rail properties having been permitted to deteriorate. The primary purpose of the Act, then, was "[t]he reorganization of railroads in this [Northeast] region into an economically viable system capable of providing adequate and efficient service to the region". §101(b)(2). The problem is immediate and of great magnitude. Delay, therefore, unnecessarily experienced is something Congress sought to avoid.

It is not a sufficient answer that the appeal to the Seventh Circuit could correct the original error. There has already been delay, and further delay conflicts with the Act's objectives. USRA determinations, so critical to the effectiveness of this reorganization, were to be treated by this Court exclusively, and the carefully constructed exclusivity provision as well as the broader purposes of the Act indicate that infringements on our exclusive jurisdiction be deemed nullities.

The fact that Congress intended to void judgments inconsistent with our exclusive jurisdiction is further buttressed by §209(g), which gives this Court power to enjoin any court proceeding, other than in the Supreme Court, inconsistent with the effective implementation of the Act,

This extraordinary power lends additional support to the conclusion that Congress intended that certain decisions be made in the Special Court only and without delay. It is our view then that Congress intended that determinations made by other courts, which determinations come within our exclusive jurisdiction, are void.

In sum, the purposes of the Act and the language of the Act, particularly that of §§101(a), 101(b)(2), and 209(e)(1)(C), compel us to hold that Congress concluded that the policies supporting our exclusive jurisdiction outweigh the policies of res judicata. *United States* v. *United States Fidelity and Guaranty Company,* 309 U.S. 506 (1940); Restatement, Judgments § 10 (1940); Restatement 2d, Conflict of Laws, § 97, Commentary d. (1969); *In Re Penn Central Trans. Co.,* 384 F. Supp. 895, 914 (1974).[13]

While ConRail's course of litigating the jurisdictional issue in another court rather than coming to us for an injunction is not to be commended and, we trust, will not be repeated, we must enforce what we take to be the will of Congress.

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[13] Although in a different context, what we said in *In Re Penn Central* is relevant here. In deciding whether we should refuse to consider relevant issues of law simply because they were also decided by another court, we said:

> Congress envisioned a special role for this court, which in contrast to the *Connecticut General* court, can look at all the proceedings rather than only at one, and has available more ample factual records. We do not think Congress intended that in the cases which it put before us, raising issues of such major public importance, our review of the decisions of the district courts under the second sentence of § 207(b) should be trammeled by the decision of another court . . . .

IV. Timely Conclusion of the ConRail-L & N Trackage Agreement

As stated, jurisdiction in this case is based on §209 (e)(1)(C). *See* Part II of this opinion. The standard of review is set forth in §209(e)(1). In pertinent part, this reads:

> Relief shall not be granted in any action referred to in subparagraph (A), (C), or (E) unless the person seeking such relief establishes that the Association acted in deliberate or reckless disregard of applicable law.

The validity of the trackage agreement depends on whether it was timely concluded within the meaning of §206(d)(4). This section requires that:

> Where the final system plan designates specified rail properties of a profitable railroad operating in the region as authorized to be offered for sale or lease to the Corporation . . ., such designation and authorization shall terminate 95 days after the effective date of the final system plan unless, prior to such date, a binding agreement with respect to such properties has been entered into and concluded.

We note at the outset that the determination of the meaning of the relevant terms in §206(d)(4) is a question of federal law. We are not interpreting a contract in accordance with state law. And we are not concerned with the parol evidence rule of Illinois.[14] We are a federal

[14] The district court in Illinois based its decision on the assumption, mistakenly, we believe, that Illinois law applied and that the parol evidence rule of Illinois forbade evidence showing that the ConRail-L & N agreement was concluded on February 10 or no later than February 11, 1976.

court construing a federal statute and acting under an unusually strong congressional mandate to give effect to the determinations of the USRA as long as that association does not act in "deliberate or reckless disregard of applicable law".

There was considerable dispute in the district court as to when the ConRail-L & N Agreement was "entered into and concluded" within the meaning of §206(d)(4). It is undisputed, however, that the agreement was in fact executed on February 10, 1976, and post-dated February 12, 1976. The L & N was required to complete various labor agreements under Section 508(b). The trackage agreement was dated February 12, 1976, to allow for the execution of the labor agreements on February 11.[15] All parties agree that the trackage agreement was concluded at the latest by February 12, 1976.

The FSP became effective on November 9, 1975. The question is whether the February 12, 1976, date satisfies the 95 day requirement. The State contends that the 95th day was February 11. The district court agreed with the State. Rule 6(a) of the Federal Rules of Civil Procedure relating to computation of time states that the day of the event from which the designation period begins (November 9, 1975) is not included; the count would therefore begin with November 10.

Rule 6(a) establishes the method of computing "any period of time prescribed or allowed by these rules [of Federal Civil Procedure] . . . or by any applicable stat-

[15] There is apparently some dispute as to whether the labor agreements were completed by February 11. There seems to be no dispute, however, that the agreements were completed by February 12.

ute". The Rules govern only the procedure of federal district courts, not substantive law, and hence, as Professor Moore observes, Rule 6(a) "does not provide a general rule of statutory construction which courts are bound to apply to all time periods mentioned in any statute". 2 Moore's Federal Practice §6.06 at 1500.20 (2d Ed. 1975). But in computing various periods of time specified in a statute, a court may properly adopt, by analogy, the method of computation prescribed by Rule 6.

Our interpretation of the statute is that Congress did not intend to depart from the usual rule of computing a time limitation. Beginning with November 10 as the first day and counting to 95 gives February 12 as the last date before termination of the designation.

The language of the section supports this view: Section 206(d)(4) states that the designations are effective until "95 days *after* the effective date of the final system plan". When the section goes on to say "unless prior to such date", it means prior to midnight of the 95th day. The result of this counting is that February 12, 1976, is the last day on which an effective agreement could be reached.

We hold that the ConRail-L & N agreement was timely concluded within the meaning of §206(d)(4). A fortiori, neither USRA's "determination" that the agreement was valid nor its failure to certify the Paris-Lawrenceville segment for conveyance was in "reckless or deliberate disregard of applicable law". §209(e)(1)(C).

V. Standards Applicable to Issuance of Preliminary Injunction

This Court, in *Trustees of the Property of Penn Central Transportation Co.* v. *Consolidated Rail Co.*, ... F. Supp. ....., Sp. Ct. Reporter, D3-000002, at 000010 (Sp. Ct. R.R.R.A. May 14, 1976), accepted *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F. 2d 921 (D. C. Cir. 1958) as enunciating the applicable standards governing the issuance of a preliminary injunction:

> The controlling standards for the issuance of such an injunction in a case like this, where the public interest is deeply implicated, were classically stated . . . [as] probability of success on the merits; irreparable injury to the proponent; harm to the interested parties; and the public interest.

(A) As our discussion demonstrates, ConRail has an overwhelming probability of success on the merits.

(B) The only harm to Illinois is that it is restrained from interfering with ConRail's providing rail service over the L & N trackage. But Illinois would have been in this same position if it had originally complied with the USRA determinations regarding the ConRail-L & N trackage agreement. The financial harm to Illinois is no more than that contemplated by the FSP and specified in the financial calculations attached to its agreement with ConRail.

In this context ConRail need not show that unless the injunction issues "rigor mortis will set in forthwith." *Studebaker Corp.* v. *Gittlin*, 360 F.2d 692, 698 (2d Cir. 1966). That the harm to ConRail cannot be repaired constitutes a sufficient showing. *Id.*

Although it would appear that ConRail is permitted to route shipments over the L & N as a consequence of the tariff filed with the I.C.C., at least until December 31, 1976, there is a sufficient showing of harm to ConRail. To begin, the tariff will expire on December 31 and it is not certain that a final decision by this Court will antedate the expiration date. The fact that the I.C.C. might approve a tariff extending beyond December 31 is not a certainty. Denial of the preliminary relief requested will frustrate further the tasks envisioned for ConRail in §302 of the Act—the improvement in the efficiency of railroad operations.

(C) ConRail's operations pursuant to the congressionally approved FSP represent public interest planning by USRA. The Act and FSP aim toward the achievement of an efficient, viable rail transportation service in a large and important section of the country. Actions that interfere with the attainment of that goal seriously harm the public interest.

The balancing of interests in this case favor grant of the preliminary injunction.[16] The harm to Illinois is no

[16] Our power to grant the injunction is explicitly granted in §209(g), which permits us to enjoin any court proceeding, other than in the Supreme Court, which impairs the effective implementation of the Rail Act. Arbitration may or may not be a part of a court proceeding. Section 209(g), however, should be read with reference to the purpose it sought to achieve. The Special Court is to protect against impairments of the Act and was given injunctive power to carry out this task. There is no policy basis for assuming that Congress granted this Court power to enjoin a court of appeals but left us powerless to prevent an arbitration which might impair the effective implementation of the Act. Particularly since §1202(c) of the Operating Agreement makes the arbitration award en-

more than that contemplated by the FSP. ConRail, on the other hand, appears likely to succeed on the merits, and its ability to pursue objectives important both to ConRail and to the public would be impaired if ConRail's request were denied. On balance, the interests in favor of preliminary relief to ConRail preponderate.

VI. Scope of the Preliminary Injunction

As for the arbitration, our only concern is that the arbitrators not predicate any conclusions on the basis of the invalidity of the ConRail-L & N trackage agreement. The arbitrators are enjoined from doing so. The State of Illinois and ConRail have no power to agree by arbitration to a review of the FSP or to a rewriting of USRA's determinations. In other respects the arbitration is not subject to the preliminary injunction.

In light of what we have said, this Court:

(1) Declares that the Illinois-L & N trackage rights agreement was timely entered into and concluded within the meaning of §206(d)(4);

(2) Declares that the State of Illinois and the other defendants have no right of action and no right to arbitrate the issues of the validity of the ConRail-L & N

[16] (Continued)
forceable in court as a matter of contract law, the quasi-judicial nature of the arbitration makes application of §209(g) appropriate. We need not rely solely on §209(g), however, as §209(b) gives us the powers of a normal reorganization court and of a district judge in any judicial district. Thus §209(b) supplies power to enjoin the arbitration.

trackage agreement in any forum other than this Court and that the litigation of those issues in any other forum is a nullity;

(3) Preliminarily enjoins all defendants from seeking to enforce the injunction they obtained in the Illinois district court and from seeking resolution of the issue of the validity of the ConRail-L & N trackage agreement except in this Court; and

(4) Denies the State's motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

/s/ Henry J. Friendly
Presiding Judge

/s/ John Minor Wisdom
Judge

/s/ Roszel C. Thomsen
Judge

November 29, 1976

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ILLINOIS

STATE OF ILLINOIS, et al.,
Plaintiffs,

vs.

CONSOLIDATED RAIL CORPORATION and THE LOUISVILLE & NASHVILLE RAILROAD,
Defendants.

No. 76-2-042

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Motion of plaintiffs for a Temporary Restraining Order having come on for hearing, statements of counsel and testimony having been heard in open Court with all parties having full opportunity to present evidence, examine and cross-examine witnesses, file briefs and make arguments, and the Court being fully advised in the premises, the Court herewith makes the following Findings of Fact and Conclusions of Law:

I

FINDINGS OF FACT

1. Plaintiffs filed their complaint herein on April 2, 1976, and an Amended Complaint April 14, 1976. Defendant Consolidated Rail Corporation filed its Answer and Affirmative Defenses on April 30, 1976, and the defendant Louisville & Nashville Railroad filed its Petition to Intervene April 28, 1976, and its Answer and Affirmative Defenses May 3, 1976.

2. Defendant Consolidated Rail Corporation is a Corporation organized under the laws of the State of Pennsylvania and a citizen thereof and transacts business and is found within the Eastern District of Illinois. It was created by Congress, pursuant to the Regional Rail Reorganization Act of 1973 as a for-profit corporation to which properties and routes of certain bankrupt railroads, including the Penn Central, would be transferred. Pursuant thereto, and on April 1, 1976, it took over operations of the Penn Central in this Judicial District.

3. Defendant-Intervenor Louisville & Nashville Railroad is a corporation organized under the laws of the State of Kentucky and a citizen thereof and transacts business and is found within the Eastern District of Illinois.

4. Plaintiff The State of Illinois is one of fifty sovereign states of the United States and is proceeding here through the Illinois Attorney General and on behalf of the Illinois Department of Transportation.

5. Plaintiffs, Clark County, Crawford County, Lawrence County and Wabash County are county governments and corporations organized under the laws of the State of Illinois.

6. Plaintiffs City of Robinson and the City of Mt. Carmel are municipal corporations organized under the laws of the State of Illinois.

7. Plaintiff Greater Wabash Regional Planning Commission is a corporation organized under the laws of the State of Illinois, with membership from the counties of Crawford, Clark, Lawrence and Wabash.

8. The railroad operations sought to be enjoined by the plaintiffs are subject to and governed by the pro-

visions of the Interstate Commerce Act, 49 U.S.C. Sec. 1 (18) and Sec. 5 (2), the Regional Rail Reorganization Act of 1973, 45 U.S.C. 701 et seq., the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210, Sec. 101 et seq., approved February 5, 1976 (RRRRA), which are each, and taken together, Act of Congress to regulate commerce within the meaning of 28 U.S.C. Sec. 1337.

9. The amount in controversy exceeds $10,000.00 exclusive of interests and costs.

10. Defendants contend that the Special Court created by 45 U.S.C. Sec. 719 (a) & (b) has original and exclusive jurisdiction over the subject matter of this action, and that the Federal District Court is without jurisdiction. This section was amended by Sec. 602 (b) of the RRRRA of 1976. A reading of Sec. 719 as amended, including the legislative history of Sec. 602 (b) of the RRRRA of 1976, does not convince the Court that the subject matter of the complaint herein falls within the original and exclusive jurisdiction of the Special Court. Defendants further contend that the Interstate Commerce Commission has exclusive jurisdiction (sic) under 49 U.S.C. Sec. 5 (8) to seek injunctive relief in the District Courts for violations of 49 U.S.C. Sec. 5 (2). While it is true that Sec. 5 (8) gives the I.C.C. "standing", in such instances, it is clear that by the savings clause of the Act, 49 U.S.C. Sec. 22 (1), the remedy is supplemental rather than exclusive. Without so deciding, it may be true that the Commission is the only party that may request an injunction to issue to compel obedience to its order, *Clemens* v. *Central R. Co. of New Jersey,* 264 F.Supp. 551 (D.C.Pa. 1967), rvsd. on other grounds, 399 F.2d 825, or where a party to the action has already been

charged in complaint before the Commission with a violation of Section 5. *Chicago S.S. & S.B.B.R.* v. *Monon R.R.*, 235 F.Supp, 984 (D.C.Ill. 1964). Plaintiffs have cited to this Court cases from other federal district courts and from the U.S. Court of Appeals for the Seventh Circuit, *Chicago and North Western Ry. Co.* v. *Peoria and Pekin Union Ry. Co.*, 319 F.2d 117 (7th Cir. 1963), in which injunctions were properly granted plaintiffs other than the Interstate Commerce Commission concerning 49 U.S.C. Sec. 5 agreements subsequent to the enactment of the Emergency Railroad Transportation Act of 1933 which added the provision to Section 5 codified in 49 U.S.C. Sec. 5 (8). Plaintiffs further contend and the Court agrees that this Court has jurisdiction under 28 U.S.C. Sec. 1331 and 28 U.S.C. Sec. 1337 to grant pursuant to 28 U.S.C. Sec. 1651 the injunctive relief sought for enforcement of Sec. 5 (2) and the right of the plaintiffs to bring their action for injunction is in no way diminished by Sec. 5 (8). Plaintiffs also contend and the Court agrees that Sec. 1 (18) of the Interstate Commerce Act as amended by Sec. 801 (a) of the RRRRA grants this Court jurisdiction to enjoin operations contrary to the provisions of Sec. 1 (18). See, e.g.: *Thompson* v. *Texas Mexican Ry. Co.* 328 U.S. 134, 144 (1946); *Chicago & Northwestern Ry. Co.* v. *Chicago, Milwaukee St. Paul & Pacific R. Co.*, 502 F.2d 193, 196 (7th Cir. 1974); *United Transportation Union* v. *Burlington Northern, Inc.*, 319 F.Supp. 451 (D. Minn. 1970). This Court is persuaded that the required authorizations to operate over trackage as opposed to the terms and conditions of acquiring a property interest in that trackage is governed by 49 U.S.C. 1 (18). The additional element of track construction to allow for the operation of mainline interstate trains, present in this case, further supports the

conclusion that 49 U.S.C. Sec. 1 (18) applies here. *Texas & Pacific Ry. Co.*, v. *Gulf Colorado & Santa Fe Ry., Co.*, 270 U.S. 266, 278, (1926).

11. To provide for a comprehensive federally financed reorganization of the Penn Central Railroad and six other bankrupt carriers, Congress passed and the President signed into law the Regional Rail Reorganization Act of 1973, hereinafter referred to as the RRRA. This Act applied to a 17 state region in the Northeast and Midwest portions of the United States of America, involving an area, roughly, north of the Mason-Dixon Line and east of the Mississippi River.

12. The RRRA created three new instrumentalities: the United States Railway Association (USRA); the Consolidated Rail Corporation (ConRail); and, the Rail Service Planning Office (RSPO). USRA was assigned the task of developing a preliminary reorganization called the Preliminary System Plan (PSP), which was published for comment and criticism by the general public at hearings scheduled by RSPO. Based on these public comments and a RSPO critique of PSP, USRA developed a final proposal under the RRRA called the Final System Plan (FSP). This Plan became effective November 9, 1975.

13. Under the RRRA, ConRail was created as a for-profit corporation, to which a special Three Judge Bankruptcy Court (the Special Court) in Washington would transfer rail property and other assets of the bankrupt carriers in exchange for ConRail stock and other securities. This transfer occurred April 1, 1976, and ConRail began its common carrier service on that date.

14. The Final System Plan developed by USRA stipulates, as required by Sec. 206 (c) of the RRRA, 45

U.S.C. Sec. 716 (c), which bankrupt properties must be transferred to ConRail or other solvent carriers. Under said Sec. 206 (c), the Plan also designates which rail properties (including trackage rights agreements) of solvent carriers may be acquired by ConRail within certain time limitations set forth in Sec. 206 (d)(4), 45 U.S.C. Sec. 716 (d)(4). In addition, the Plan indicates which bankrupt rail lines are excluded from the ConRail system and are thus "available for subsidy."

15. All proposals in the Final System Plan for acquisitions by ConRail of the properties (including trackage rights) of solvent carriers were not binding on any carrier. Under Sec. 206 (d)(4) acceptance by profitable carriers of such proposals was required to be achieved through binding agreements entered into within certain deadlines. Two purported Louisville & Nashville—ConRail agreements, dated February 12, 1976, were subject to the time deadline provisions set forth in Sec. 206 (d)(4) of the RRRA, as amended by Sec. 607 (o) of the RRRA:

> "Where the final system plan designates specified rail properties of a profitable railroad operating in the region as authorized to be offered for sale or lease to the Corporation or to other profitable railroads operating in the region, such designation and authorization shall terminate 95 days after the effective date of the final system plan unless, *prior to such date,* a binding agreement with respect to such properties has been entered into and concluded." Public Law 93-236, 87 Sts. 997, Sec. 206 (d)(4); 45 U.S.C. 716 (d)(4); as amended by Public Law 94-210, Sec. 607 (o), February 5, 1976, (emphasis added).

Since the Final System Plan took effect November 9, 1975, the deadline for entering into a valid agreement under Sec. 206 (d)(4) as amended by Pub. Law 94-210 Sec. 607 (o) was midnight, February 11, 1976.

16. On April 1, 1976, defendant ConRail commenced operating certain of its freight trains on certain rail properties of the Louisville & Nashville Railroad, pursuant to the purported agreements described above in Paragraph 15. These operations began at Carmi, Illinois, within the State of Illinois, and continued southeasterly to cross the Wabash River into the City of Evansville, Indiana, where the trains of ConRail were switched onto northbound track of the Louisville & Nashville Railroad whereupon they continued over such track to a point within Indiana just east of Danville, Illinois, and thence moved westward across the Illinois border into Danville. Said trains then continued northward out of Danville, Illinois, to the Chicago market area.

17. Prior to April 1, 1976, such trains were moved over the Penn Central track between Carmi and Danville, Illinois. Such operations took place entirely within the State of Illinois, and the trains passed through Clark, Crawford, Edgar, Wabash and Lawrence Counties enroute from Carmi to Danville. This operation included trackage between Lawrenceville and Paris, Illinois.

18. Except as the defendants would have complied with the statutory deadline established by Sec. 206 (d)(4) of the RRRA as amended, the requirement for an application to the Interstate Commerce Commission for authority to operate under 49 U.S.C. Sec. 1 (18) and under 49 U.S.C. Sec. 5 (2) is not excused by any of the provisions of the RRRA, as amended, 45 U.S.C. Sec. 701 et seq., or by the provisions of the RRRRA.

19. The defendants have sought to prove by affidavit and testimony that the trackage rights agreements referred to in Paragraph 15 above were in fact signed and concluded between them on February 10, 1976, instead of

February 12, 1976, the date appearing on the face of each of the agreements. The Court finds, however, that the agreements are fully integrated final expressions of the defendants' intent, and further finds that, on the question of receiving the proofs which defendants have tendered on the issue of the date when the agreements were concluded, the Court is bound by the doctrine set forth by the Illinois Supreme Court in *Walter* v. *Sohio Petroleum Co.*, 402 Ill. 33, as follows:

> "It is the well-settled rule that parol evidence is not admissible to contradict the terms of a contract in writing actually entered into, and particularly against an innocent third party."

In addition, the Court finds as a matter of fact that the dates on the instruments accurately reflect the defendants' intent, which was to date the agreements in such a way as to maximize the time in which they had to conclude certain labor agreements, (see paragraph 20 *infra*).

20. There exists a further reason why the trackage rights agreements were not capable of being finally concluded prior to midnight February 11, 1976, within the meaning of Sec. 206 (d)(4) of the RRRA as amended. Section 508 (a) and (b) of the RRRRA as amended requires that both carriers participating in such agreements must, as a precondition, conclude with their affected labor unions agreements for the protection of union membership. The affidavit of Emereid Cole submitted by the defendants, together with his testimony, shows that all such agreements had not been concluded prior to the time the defendants would seek to prove they actually signed the agreements. An analysis of the agreements themselves in light of the precise statutory language of Sec. 206 (d)(4), supports a finding of their invalidity as

well. Even if the purported agreements had been executed in a binding manner so as to support the contention that they were validly "entered into", the parties did not "conclude" the agreements before the February 12, 1976 deadline. Until ConRail notified the Louisville & Nashville of their intention to use the "joint track", ConRail had the option to effectuate or not effectuate the agreements by their own terms until January 1, 1977.

Furthermore, the purported agreements prohibit ConRail trains from entering or leaving the Louisville & Nashville tracks at any point other than Carmi, Illinois or Woodland Junction, Illinois. (See Agreement, Art. I, B(ii).) The evidence indicates that although ConRail trains have left or entered the Louisville & Nashville lines on the south at Carmi, Illinois, they have never operated through to Woodland Junction, Illinois on the north, but have instead entered or left the Louisville & Nashville tracks on the north at Terre Haute, Indiana or Danville, Illinois. Thus, the Defendants are not even operating pursuant to the purported agreements but in fact have varied the agreements subsequent to their execution.

21. Because the trackage rights agreements between them were not properly concluded within the time limitations of Sec. 206 (d)(4) of the RRRA as amended, ConRail and Louisville and Nashville Railroad are required to seek approval of the Interstate Commerce Commission pursuant to 49 U.S.C. Sec. 1 (18) prior to instituting the operation by ConRail over the Louisville & Nashville lines described in Paragraph 16 above.

22. Defendants admitted during hearings that they had not applied to the Interstate Commerce Commission

for authority to operate under the trackage rights agreements.

23. With regard to lines excluded from the ConRail system, the trustees of the Penn Central could, under the Final System Plan, promptly abandon and sell excluded lines without Commerce Commission approval, unless a state offered the trustees and ConRail a subsidy to continue rail operations in accordance with the combined federal-state subsidy program described below.

24. A portion of the former Penn Central road described above, on which ConRail was operating prior to diverting traffic over Louisville & Nashville lines in Indiana, is such an excluded line, known as the Paris to Lawrenceville portion of the Cairo branch of the former Penn Central Railroad. The Cairo branch in its entirety constitutes a major north-south mainline running from Chicago, Illinois via Danville, Paris and Lawrenceville to the Cairo, Illinois, "Gateway" all along the Eastern border of the State of Illinois.

25. Pursuant to Title IV the State of Illinois developed a "State Rail Plan", which was ultimately approved by the Federal Railroad Administration. Concurrently, the Illinois State Legislature passed an Act providing funds for the joint state-federal subsidy program (Illinois Revised Statutes, Paragraph 127, Sec. 49.25 (a)-(g)). This Statute required the Illinois Department of Transportation to implement the State Rail Plan and to both continue and improve rail service on all lines in Illinois excluded from the ConRail system in the Final System Plan.

26. The Paris to Lawrenceville portion of the Cairo branch of the former Penn Central is under subsidy under the State Rail Plan.

27. Pursuant to the State Rail Plan, the Illinois Department of Transportation contracted with ConRail to provide locomotive, crew and car service on the Paris-Lawrenceville line. Under this contract, and pursuant to the provisions of Sec. 304 of the RRRA, ConRail receives a subsidy payment from the State of Illinois to the extent that costs of operations exceed revenues from freight traffic either generated on the line or, in part, moving over it. In the event that revenues exceed costs, then the line is "profitable". These "profits" go to the State of Illinois, not to ConRail. The State may use such profits to defray expenses of its rail program.

28. A revenue loss to the State of Illinois of approximately $1,000,000 per year results from large unit train shipments of coal traditionally moved on the Cairo branch being moved over the Louisville & Nashville rail lines rather than moving over the State subsidized Paris-Lawrenceville line.

29. Since operating costs on the line are fixed costs, any reduction in freight revenues which could otherwise be set off against such costs necessarily increases the State's subsidy payment to ConRail. Diversion of freight traffic at Carmi to the Louisville & Nashville line reduced freight revenues and has the effect of increasing subsidy payments to ConRail, although certain of these costs are reimbursed by the Federal Government. Furthermore, diversion of such traffic deprives the State of Illinois of substantial revenues and profits from unit coal train operations. These losses of revenues and increased subsidy payments cause irreparable loss to the State of Illinois. Dollars expended for increased operation costs must be taken from the State Rail Plans rehabilitation program, thereby substantially and irreparably restricting

rehabilitation of the Paris-Lawrenceville line planned by the State.

30. The plaintiff cities and counties, situated along the Cairo branch of the former Penn Central line will lose substantial revenues from an ultimate loss of taxable properties. The Court finds that as a result of the diversion of rail traffic, as aforementioned, there will be a significant decline in general economic and business activity along said route, due to the ultimate loss of viable competitive rail service to those locations.

II

CONCLUSIONS OF LAW

1. This Court has jurisdiction at this time, not the Special Court. Section 209 of the RRRA as amended by Sec. 602(b) of the RRRRA does not apply to the proceedings before this Court, rather this Court has jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1332, 28 U.S.C. 1337, 28 U.S.C. 1391, 28 U.S.C. 1651, 45 U.S.C. 701 et seq., 49 U.S.C. Sec. 1 (18), 49 U.S.C. Sec. 5(2), Pub. Law 94-210 Sec. 101 et seq. 49 U.S.C. Sec. 1 (18) as amended by Sec-801 (a) of the RRRRA grants an appropriate district court jurisdiction to enjoin operations contrary to Sec. 1(18) which includes operations under trackage rights. Section 801(e) of the RRRRA specifically provides for the Attorney General of an affected state to bring a civil action to enjoin any operation that is contrary to the provisions of Paragraph (a) of Sec. 1(18).

2. Because the trackage rights agreements entered into between the defendants dated February 12, 1976, were neither final nor timely within the terms, definitions and meanings of Sec. 206(d)(4) of the RRRA as amended,

the operations by the defendant ConRail over Louisville & Nashville lines pursuant to those agreements are not exempted from review by the I.C.C.

3. The operations of ConRail trains over the Louisville & Nashville lines are and continue to be without authority of the Interstate Commerce Commission and, therefore, in violation of the Interstate Commerce Act, as amended, in particular, 49 U.S.C. Sec. 1(18), 49 U.S.C. Sec. 5(2).

4. Under the facts found by this Court, the requirement of I.C.C. approval of the trackage rights agreements in question under 49 U.S.C. Sec. 5(2) is not excused by any of the provisions of the RRRA, as amended, 45 U.S.C. Sec. 701, et seq., or any provision of the RRRRA.

5. A temporary restraining order will cause no irreparable harm to the defendants and the issuance of a temporary restraining order will preserve the status quo and preclude further illegal operations by the defendants. The defendants may petition the Interstate Commerce Commission for a Certificate of Public Convenience and Necessity, or other approval to implement any agreements they may have between themselves. Furthermore, ConRail may move all through coal and other freight, currently moving through Indiana, on the Cairo line from Carmi to Danville, Illinois, should it so desire.

6. If a restraining order is not granted, plaintiffs will suffer irreparable harm in at least the following ways:

(a) Increase in subsidy payments to ConRail;

(b) Loss of revenue on the State of Illinois subsidized line between Lawrenceville and Paris;

(c) Impairment of track rehabilitation occasioned by the necessity to divert rehabilitation funds to operation expenses;

(d) Loss of revenue to the communities situated along the Cairo branch.

Entered This 5th day of August, A.D., 1976.

/s/ Henry S. Wise
Chief Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ILLINOIS

STATE OF ILLINOIS, et al.,

Plaintiffs,

vs.

CONSOLIDATED RAIL CORPORATION and THE LOUISVILLE & NASHVILLE RAILROAD,

Defendants.

No. 76-2-042

PERMANENT INJUNCTION

Motion of plaintiffs for a Permanent Injunction having come on for hearing, both sides present in open Court, oral argument heard, and the Court being fully advised in the premises, having filed its Findings of Fact and Conclusions of Law and having directed that its order enter in accordance therewith,

It Is Therefore Ordered That the defendants Consolidated Rail Corporation and The Louisville & Nashville Railroad, their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with the defendants to whom actual notice of this order shall come, be and are hereby enjoined and restrained from operating or participating in the operation of ConRail trains and/or equipment under the Trackage Rights Agreements at issue herein over the lines of the Louisville & Nashville Railroad between Carmi and Danville, Illinois, by way of Evansville, Indiana, until

such time as approval of such operations is granted by the Interstate Commerce Commission.

Entered this 18th day of August, A.D. 1976 at 4:30 P.M.

/s/ Henry S. Wise
Chief Judge